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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH L. BONDERER, Defendant and Appellant.	C083389 (Super. Ct. No. 13F07072)

Defendant Joseph L. Bonderer kidnapped S. from a Walmart parking lot after she returned to her car with groceries. S. had gone to the store alone at night to buy milk for her son's morning cereal. Defendant lay in wait as she returned to the car. After S. put the groceries in the trunk and got into the car to drive away, defendant entered through the passenger side door, said he had a gun, and threatened to kill her if she did not do as he said. Complying with his demands, S. drove to a secluded area a few miles away, where defendant forcibly raped and sodomized her, among other forcible sex acts, and then drove him back to the Walmart parking lot.

Defendant was tried by jury and convicted of one count of kidnapping for purposes of rape, two counts of forcible sexual penetration, one count of forcible rape, one count of forcible sodomy, and one count of simple kidnapping. With respect to the sexual offenses, the jury also found a one strike allegation to be true, i.e., that defendant kidnapped S. and the movement substantially increased the risk of harm to her over and above the level of risk necessarily inherent in the underlying offense. The trial court sentenced him to serve an aggregate indeterminate term of 100 years to life in state prison.

On appeal, defendant contends: (1) the evidence was insufficient to establish he kidnapped S. for purposes of rape; (2) the trial court violated defendant's federal constitutional right to due process by admitting evidence of an unduly suggestive out-of-court identification that tainted S.'s subsequent in-court identification; (3) admission of evidence of defendant's DNA, collected following his arrest before a warrant was issued for that purpose, violated the Fourth Amendment to the federal Constitution; (4) the trial court also prejudicially abused its discretion and further violated defendant's constitutional rights by admitting into evidence the call made to 911 following the crimes; and (5) the trial court's imposition of full-term consecutive sentences for the sexual offenses resulted in an unauthorized sentence.

We affirm. As we explain, the evidence was more than sufficient to establish defendant intended to rape S. when he kidnapped her. We need not determine whether the identification procedure was unduly suggestive because, even assuming it was, we conclude the identification itself was nevertheless reliable under the totality of the circumstances. We also conclude, following our Supreme Court's recent decision in *People v. Buza* (2018) 4 Cal.5th 658 (*Buza*), the warrantless collection of defendant's DNA by means of a buccal swab did not amount to an unreasonable seizure. This

conclusion makes it unnecessary to determine whether other aspects of the warrantless collection of DNA evidence, e.g., swabbing defendant's hands and penis, violated the Fourth Amendment. Assuming a constitutional violation occurred in this regard, admission of this additional evidence was harmless beyond a reasonable doubt. Nor did the trial court abuse its discretion or violate defendant's constitutional rights by admitting the 911 call. Finally, defendant did not receive an unauthorized sentence.

FACTS

Defendant's challenge to the sufficiency of the evidence is limited to the jury's implied finding he intended to rape S. when he kidnapped her from the Walmart parking lot. He does not claim the evidence is insufficient to establish he was the one who did so, or that he thereafter forcibly raped, sodomized, and committed other sexual acts against her will. Evidence of defendant's identity as the perpetrator was overwhelming. We shall therefore briefly summarize these crimes and set forth in greater detail the evidence relevant to the question of defendant's intent.

In October 2013, S. lived in Orangevale with her husband and son. On the night of October 30, she realized she did not have milk for her son's cereal the following morning and drove to a nearby Walmart to pick some up. When she returned to her car, S. put the groceries in the trunk and then got into the car to drive away. As she started the engine, defendant emerged from between two cars, opened the front passenger side door, and got inside. S. described him as a tall white man wearing jeans and a black t-shirt with a skull on the front. He had one of his hands beneath his shirt, causing S. to believe he had a gun and was there to rob her. She was terrified. Defendant told her not to scream and threatened to kill her if she did not do as he said. After S. indicated she would do so, defendant told her to drive. S. complied and told defendant she did not have

any money. Defendant responded: "I know you don't have money." He then demanded to have sex with her and threatened to kill her if she did not do so.

Meanwhile, S. had pulled out of the Walmart parking lot and was driving northbound on Hazel Avenue. When they approached a Jewish temple on the left side of the road, defendant told her to pull into that parking lot. S. complied. At defendant's direction, S. parked the car. Defendant then said there were too many lights in the parking lot and told her to back out of the parking space and continue driving. S. again complied, turned onto Hazel, and continued northbound. S. asked where they were going. Defendant answered: "I'll figure it out." He then directed her to a more secluded location off of Old Auburn Road and told her to park and turn off the engine and headlights. S. complied with these commands as well.

After S. turned off the engine, defendant took the keys and told her to get out of the car. As she did so, defendant also got out and told her to come over to him. When S. got to the passenger side, defendant positioned himself behind her and told her to pull her pants down and place her hands on the hood of the car. S. again complied. Defendant pulled down S.'s underwear and penetrated her vagina and anus with one of his fingers. He then penetrated her vagina with his penis, commented that her vagina was "so small," and spit on his hand to lubricate his penis before reinserting it into her vagina. Defendant also penetrated S.'s anus with his penis. When S. yelled out that he was hurting her, defendant said: "Don't yell." He eventually stopped his assault, saying she was "too small," and told her to pull her pants back up. Defendant then told S. to drive him back to the Walmart. During the return drive, he said his life was "a mess" and told her not to tell anyone about what happened. When they arrived, defendant demanded to see her breasts. When she complied, he kissed and licked one of her breasts before getting out of the car.

As mentioned, the evidence establishing defendant's identity as the perpetrator was overwhelming. First, S. identified him at trial. Second, when S. got home after these traumatic events, she told her husband what happened and her son called 911. During the call, S. provided the dispatcher with a description of her attacker and repeated that description to officers who responded to her house. Officers immediately canvassed the area and talked to the doorman at a bar across the street from the Walmart, providing him with the description of the perpetrator. The doorman told the officers a man who matched the description was at the bar a short time before the crimes were committed. That man was defendant. The doorman had swiped the man's driver's license through a handheld device as he entered the bar. Information from that device was given to the officers, revealing defendant lived in an apartment complex on Hazel Avenue about 200 feet from the Walmart.

Third, relevant to both identity and intent, while defendant was at the bar for only 10 or 15 minutes, certain derogatory comments he made about women caused one of the bartenders to approach the doorman and tell him to "keep an eye on him." Specifically, while defendant was in the restroom, he told another bar patron that "it would be better if [women] had no mouths, just tits and ass." He then came out of the restroom and stared at several women at the bar and in the band that was playing that night. Defendant left a few minutes later.

Fourth, surveillance video from the Walmart parking lot captured footage of defendant walking around the parking lot for about 30 minutes before getting into S.'s car. During this time period, he approached another woman who was returning to her car. As this woman, L., described in her testimony: "I felt someone or something coming up behind me very quickly. And I turned around. And I saw that man right there behind me, and I literally just stopped and stared at him." After identifying defendant as the man

to whom she was referring, L. continued: "And we just both stopped for a moment. And then I didn't move, and then he crossed over to the parking lot to the other side. And I just kind of watched him walk, and he went over and got a shopping cart from the end [of] one of the aisles and he walked it over to another shopping cart." L. then got into her car, locked the door, and drove out of the parking lot. A few minutes after this encounter, which was also captured on the Walmart surveillance system, the footage shows S. returning to her car, putting the groceries in the trunk, and then getting into the driver's side, after which defendant emerges from shadow and enters the car through the passenger side door.

Fifth, during a subsequent search of defendant's apartment, officers found the distinctive black t-shirt with a skull on the front described by S. and the doorman and bartender from the bar.

Finally, and most damaging in terms of defendant's identity as the perpetrator, a sample of defendant's DNA was taken following his arrest. A profile was generated from that sample and compared to a partial profile generated from a sample obtained from the underwear S. was wearing that night. Defendant's profile was a match for the partial profile. The probability of a random match occurring among the Caucasian population was one in 130 billion.

DISCUSSION

I

Sufficiency of the Evidence

Defendant contends the evidence was insufficient to establish he kidnapped S. for purposes of rape. He is mistaken.

" 'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to

determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Here, S. testified to the details of her kidnapping and sexual assault, identifying defendant as her attacker. She also testified, as defendant points out in his briefing, that she believed he entered her car in order to rob her. The briefing omits a key line of testimony. After defendant told S. not to scream and threatened to kill her if she did not do as he said, S. told defendant she did not have any money. Defendant responded: "I know you don't have money." He then demanded to have sex with her and threatened to kill her if she did not do so. Defendant's response provides strong evidence his intent when he entered the car was not to rob S., but to rape her. Nevertheless, defendant points out S. initially told a responding officer that defendant first demanded money when he entered the car. However, it was for the jury to resolve this conflict in the evidence, not this court.

Moreover, "intent is rarely susceptible of direct proof and ordinarily must be inferred from a consideration of all the facts and circumstances shown in evidence. And, it necessarily follows, that if the evidence is sufficient to justify a reasonable inference that the requisite intent existed, the finding of its presence in a particular case, may not be

disturbed on appeal [citations]." (*People v. Lyles* (1957) 156 Cal.App.2d 482, 486.) Here, as defendant acknowledges, the evidence establishes he was at the bar across the street from the Walmart a short time before the kidnapping, where he commented, "it would be better if [women] had no mouths, just tits and ass." He then stared at several women at the bar and in the band that was playing that night before leaving to stalk the Walmart parking lot. He did so for roughly 30 minutes, during which he quickly approached L. from behind, but apparently lost his nerve when she turned around and stared at him. A short time later, he got into S.'s car, demanded she have sex with him, and forced her to drive to a secluded location for that purpose.

These circumstances are more than sufficient to justify a reasonable inference that defendant kidnapped S. with the intent to rape her.

II

Admission of Identification Evidence

Defendant also claims the trial court violated his federal constitutional right to due process by admitting evidence of an unduly suggestive out-of-court identification that also tainted S.'s subsequent in-court identification. We need not determine whether the identification procedure was unduly suggestive because, assuming it was, the identification itself was nevertheless reliable under the totality of the circumstances.

A.

Additional Background

Defendant kidnapped and sexually assaulted S. shortly before 11:00 p.m. on October 30, 2013. Early the next morning, after police went to the bar across the street from the Walmart with S.'s description of her attacker and obtained defendant's identity from the doorman, S. was shown a six-pack photographic lineup that included defendant's photograph. She identified someone other than defendant in that lineup.

Four days later, S. was interviewed by a detective. In the meantime, defendant's photograph was published in the Sacramento Bee, on social media, and perhaps in a televised newscast in connection with the case. The detective asked whether S. had seen the photograph. She said she had. Later in the interview, the detective showed S. the same photograph. S. identified defendant as her attacker from the photograph.

Defendant moved in limine to exclude this identification, arguing it was "the product of an impermissibly suggestive procedure," and also moved to exclude any in-court identification as tainted by the single-photograph identification. At the hearing on the motion, the prosecutor explained the detective inadvertently showed S. the photograph that had been released to the press while shuffling some papers during the interview. When S. had an "emotional reaction" to seeing the photograph, the detective asked her to explain that reaction, at which point S. identified defendant as her attacker.

The trial court denied the motion, explaining: "There is no prejudicial police conduct that took place. [¶] All the circumstances surrounding [the] identification, if [S.] identifies him at all[,] will be permitted to be gone into, including the fact that she saw it on television. That will be asked in front of the jury. What her words were to the detective, if any, when she saw the single photograph, her emotional reaction, if any, that occurred during the [seeing] of that photograph, the fact that she misidentified somebody on a prior occasion, all of that will come before the jury. And they will take that in addition to any other evidence that either tends to include you or exclude you as being the person involved in this incident. That's what the jury is here to decide, whether you had anything to do with this or not, and whether the People can prove that you had something to do with it or not through competent evidence. [¶] The jury will be able to hear all of those pieces of the equation and then ultimately make their own determination as to

whether that accurately connects you to the commission of the crime. So the motion to suppress her identification is denied."

During S.'s subsequent testimony, when initially asked whether she saw her attacker in the courtroom, she answered: "I didn't see that." She was then shown the photograph from which she previously identified defendant and was asked whether it depicted the person who hurt her. S. answered: "Yes." Later in her testimony, after describing in detail the crimes committed against her, S. was again asked whether she saw the person who hurt her in the courtroom. At this point, she identified defendant as her attacker.

B.

Analysis

" 'In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.' [Citation.] 'We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive.' [Citation.] 'Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification.' [Citation.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 901-

902; see also *People v. Thomas* (2012) 54 Cal.4th 908, 930-931; *Simmons v. United States* (1968) 390 U.S. 377, 384.)

Here, however, we need not determine whether or not the single-photograph identification was the result of an unduly suggestive and unnecessary procedure because, even assuming it was, the totality of the circumstances establishes the identification itself was reliable. S. had ample opportunity to see defendant when he got into her car in the Walmart parking lot and during their drive, particularly in the parking lot at the Jewish temple, where defendant told her to pull out and continue driving because that parking lot was so well lit. After defendant let her go following the assault, she provided an accurate description of him to the 911 dispatcher and responding officers. The doorman at the bar across the street from the Walmart immediately recognized the description as fitting defendant, who had been there shortly before the crimes. His image was also captured on the Walmart surveillance system, wearing the same distinctive t-shirt he was wearing at the bar earlier in the night and while kidnapping and sexually assaulting S. later. That shirt was found in defendant's apartment. And, as if that was not enough to demonstrate the reliable nature of S.'s identification, defendant's DNA matched that recovered from S.'s underwear.

As the United States Supreme Court stated in *Neil v. Biggers* (1972) 409 U.S. 188 [34 L.Ed.2d 401]: "It is the likelihood of misidentification which violates a defendant's right to due process . . . ." (*Id*. at p. 198.) The totality of the circumstances in this case reveals no such likelihood.

III

Admission of DNA Evidence Seized Following Defendant's Arrest

Defendant further asserts admission of evidence of his DNA, collected following his arrest before a warrant was issued for that purpose, violated the Fourth Amendment to

the federal Constitution. We conclude the warrantless collection of defendant's DNA by means of a buccal swab did not amount to an unreasonable seizure. (See *Buza*, *supra*, 4 Cal.5th 658.) That conclusion renders it unnecessary to determine whether other aspects of the warrantless collection of DNA evidence, e.g., swabbing defendant's hands and penis, violated the Fourth Amendment. Assuming a constitutional violation occurred in this regard, admission of this additional evidence was harmless beyond a reasonable doubt.

A.

Additional Background

Defendant was arrested the morning after he kidnapped and sexually assaulted S. He was brought into an interview room for questioning at 9:15 a.m. During the interview, a detective informed defendant he would be undergoing a forensic sexual assault examination. He did not object. Defendant was not handcuffed during the roughly two-hour interview. At some point, he was allowed to use the restroom, but was told not to wash his hands because the detective knew the sexual assault examination would include swabs of his hands.

The sexual assault examination was conducted at the Sacramento County Jail between 11:39 a.m. and 12:17 p.m., during which a blood sample was taken, as well as a buccal swab, swabs of both hands and penis, a pubic hair combing, and pubic hair sample. A warrant authorizing such a seizure was apparently issued at 1:35 p.m.[1]

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[1] As the Attorney General notes in the respondent's brief, this purported fact was stated in defendant's motion to suppress. However, a copy of the warrant was not offered into evidence at the suppression hearing and is not a part of the record on appeal. Nevertheless, the parties proceeded below on the assumption such a warrant was obtained, as did the trial court in ruling on the motion.

Defendant moved to suppress the DNA evidence obtained from the sexual assault examination because that examination was conducted without a warrant, noting, "this very issue is pending before the California Supreme Court in the case of [*Buza, supra*, 4 Cal.5th 658]." During the hearing on the motion, the foregoing facts were adduced. The detective also provided his reasoning for having the examination conducted as soon as possible following defendant's interview. As he explained, any foreign DNA evidence on defendant's body "could dissipate" if defendant washed his hands or penis or combed his pubic hair. Although, during cross-examination, the detective acknowledged that waiting an additional hour "probably wouldn't have made no difference" as long as they had "custody of [defendant] and he had no access to water or ability to cleanse himself." A criminalist also testified that DNA can be removed from hands or another body part by washing, sweating, or touching other surfaces.

After entertaining argument, the trial court denied the motion to suppress for three reasons: (1) defendant consented to the examination; (2) the relative fragility of DNA evidence provided an exigency justifying seizure of the evidence without a warrant; and (3) the evidence would inevitably have been discovered once the warrant issued about an hour later.

B.

Analysis

Our Supreme Court's recent decision in *Buza, supra,* 4 Cal.5th 658, controls one aspect of defendant's challenge to the DNA evidence in this case, admission of the DNA evidence obtained from the warrantless buccal swab. There, the court held the routine swabbing of a felony arrestee's cheek for DNA during the booking process, as required by the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (DNA Act), passed by the voters as Proposition 69 in November 2004, does not violate the Fourth

Amendment to the federal Constitution or its state counterpart as applied to an individual who is validly arrested on probable cause to hold that person for a serious offense. (*Id*. at pp. 664-665.) Here, defendant was validly arrested on probable cause to hold him for very serious crimes. He does not argue otherwise. Thus, the buccal swab obtained during the booking process did not violate defendant's constitutional rights. Nor did the subsequent DNA analysis of that sample. (*Id*. at pp. 673, 688-689; *Maryland v. King* (2013) 569 U.S. 435, 464 [186 L.Ed.2d 1].)

This conclusion makes it unnecessary to determine whether or not other aspects of the forensic sexual assault examination, such as the swabbing of defendant's hands and penis, the combing of his pubic hair, and the pubic hair sample, violated his constitutional rights because, even assuming such a violation occurred, it was harmless beyond a reasonable doubt. It is true that the swabbing of defendant's left hand resulted in a mixed DNA profile, with defendant's profile matching that of the major contributor and S.'s profile matching the partial minor contributor profile. While this is strong evidence defendant touched S. with his left hand, corroborating her identification of him as her attacker, it pales in comparison to the other identification evidence in this case. To summarize, the buccal swab and subsequent DNA analysis determined defendant's DNA profile was a match for a partial minor contributor profile generated from a sample taken from the underwear S. wore that night. S. identified defendant as her attacker during her testimony at trial. Surveillance footage captured defendant getting into her car in the Walmart parking lot. And the distinctive t-shirt defendant wore when he did so was recovered from his apartment. This identification evidence, coupled with defendant's behavior at the bar and in the parking lot prior to the kidnapping and sexual assault, provided overwhelming evidence of defendant's guilt.

Even assuming the trial court should have excluded the additional DNA evidence obtained during the forensic sexual assault examination, any error was harmless beyond a reasonable doubt.

IV

Admission of the 911 Call

Defendant's final claim of evidentiary error challenges the trial court's admission of the 911 call. We conclude the trial court neither abused its discretion nor violated defendant's constitutional rights in admitting the call.

A.

Additional Background

As mentioned, S.'s son called 911 after his mother came home and told her husband what happened. During the call, S.'s husband can be heard yelling and saying to S., "I don't know why you go to Walmart." As the call was transferred from the California Highway Patrol to the Sacramento County Sheriff's Department, the transferring dispatcher can be heard saying: "He's very upset with her." S. then got on the phone, described her attacker, and told the dispatcher what happened. During S.'s account of events, her husband continued yelling in the background, most of which was unintelligible. At one point, he said: "You can (unintelligible) while he rape you (unintelligible) what you think?" This prompted the dispatcher to have S. put her husband back on the phone. He was then admonished: "Why are you yelling at your wife? This is not her fault." When the husband began to offer a reason, he was interrupted with: "But she needs you to calm down and be there and support her right now. Do you understand? We need her calm so that we can get the suspect information and try to catch this guy. [¶] . . . [¶] So you need to take a few deep breaths and you need to start being kind to your wife. She didn't do anything wrong." The husband

responded: "Well I keep telling her be careful all the time and she never do and that's why that's what happened to her." After receiving another rebuke from the dispatcher, the husband began relaying the dispatcher's questions to S., who can be heard answering them over the line, although many of the answers are unintelligible. Eventually, the dispatcher asked to speak to S.'s son, who was 16 years old at the time. With the son relaying questions to his mother, S. was able to provide a more detailed description of the person who kidnapped and raped her. The call ended when officers arrived on the scene.

Defendant objected to admission of the 911 call. Defense counsel argued: "Your Honor, my primary concern is the prejudicial nature of [S.'s] husband screaming at her." In response to the trial court's suggestion that the husband's yelling reflected poorly on his character, not that of defendant, defense counsel argued: "My concern is that it will encourage and enhance any sympathy that the jury already feels. And I think it's that, that causes me the concern, not that it will . . . reflect poorly on [defendant], but rather that it will, in essence, bolster her."

The trial court ruled: "The 9-1-1 call will be admitted. It is highly probative certainly, because it reflects a highly distraught female describing the events very, very shortly after they occurred. She provided not only a witness description, some very minimal details about the event, but her emotional state is obvious from the 9-1-1 call. And any, I suppose, prejudicial effect or sympathy will be addressed by the jury instructions. [¶] . . . [¶] But the 9-1-1 call will be admitted as . . . the probative value is extreme, and the prejudicial effect, if any, is minimal, especially against your client. I think it more accurately negatively reflects on the victim's husband."

B.

Analysis

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.)[2] One exception to the general rule of admissibility of relevant evidence is section 352. This section provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) Section 352 "permits the trial judge to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption," but also "requires that the danger of these evils substantially outweigh the probative value of the evidence." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Tran* (2011) 51 Cal.4th 1040, 1047.) We review the trial court's decision to admit evidence under this provision for abuse of discretion and "will overturn the exercise of discretion only when the trial court's assessment appears to exceed the bounds of reason." (*People v. Moore* (2016) 6 Cal.App.5th 73, 91.)

Here, the 911 call was both highly probative and not unduly prejudicial for the reasons expressed by the trial court. Indeed, 911 calls reporting a witness's perception of a stressful event are routinely admitted into evidence. (See, e.g., *People v. Boyce* (2014) 59 Cal.4th 672, 688 [evidence of two 911 calls made immediately after the victim was shot in the head not unduly prejudicial]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 101 [evidence of 911 call not unduly prejudicial even though caller was heard screaming on the recording], abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th

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[2] Undesignated statutory references are to the Evidence Code.

610, 637-638.) This is so regardless of the fact S. testified at trial. As our Supreme Court stated in *Boyce*: "[T]he court had broad discretion to admit corroborating evidence that was nearly contemporaneous with the crimes." (*Boyce*, *supra*, 59 Cal.4th at p. 688.) Moreover, we also agree with the trial court's assessment that S.'s husband's yelling did not negatively reflect upon defendant. Thus, any prejudice to defendant is not direct, but flows indirectly from potential sympathy for S. due to her husband's callous response to her having been raped. Such sympathy, while a real possibility, is far less palpable than that existing in *People v. Streeter* (2012) 54 Cal.4th 205, where a recording of the victim screaming during an ambulance ride to the hospital was held to have been properly admitted in a torture murder case. (*Id*. at pp. 236-238.)

The trial court neither abused its discretion nor violated defendant's constitutional rights by admitting the 911 call.

V

Imposition of Full-term Consecutive Sentences

Finally, we also reject defendant's assertion the trial court's imposition of full-term consecutive sentences for the sexual offenses amounted to an unauthorized sentence. It did not.

We first note the probation report recommended imposition of full-term consecutive sentences for Counts 2 through 5 under Penal Code section 667.6, subdivision (c), providing the trial court with discretion to impose such sentences for specified crimes "if the crimes involve the same victim on the same occasion." The trial court, however, imposed full-term consecutive sentences under subdivision (d) of this section. This subdivision provides in relevant part: "A full, separate, and consecutive term shall be served for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In

determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (Pen. Code, § 667.6, subd. (d).)

In imposing such sentences, the trial court found defendant "violated [S.] in so many ways on separate occasions with the ability and opportunity to reflect on whether this was a good idea moving forward, and he chose to move forward and did so." "Once a trial judge has found under [this subdivision] that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior." (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 (*Garza*).)

"[A] finding of 'separate occasions' under Penal Code section 667.6 does not require a change in location or an obvious break in the perpetrator's behavior: '[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.' [Citation.]" (*People v. Jones* (2001) 25 Cal.4th 98, 104.) For example, in *Garza, supra,* 107 Cal.App.4th 1081, we held the trial court could reasonably have concluded three forcible sex offenses occurred on "separate occasions" even though each was committed against the victim while in a parked car during the span of several minutes. (*Id*. at p. 1092.) We explained: "After defendant forced the victim to orally copulate him, he let go of her neck, ordered her to

strip, punched her in the eye, put his gun to her head and threatened to shoot her, and stripped along with her. That sequence of events afforded him ample opportunity to reflect on his actions and stop his sexual assault, but he nevertheless resumed it. Thus, defendant's first act of rape was committed on a separate occasion from the forcible oral copulations. [Citation.] [¶] Similarly, defendant had an adequate opportunity to reflect upon his actions between the time he inserted his finger in the victim's vagina and the commission of the first rape. During this interval, defendant (1) began to play with the victim's chest[,] (2) put his gun on the back seat[,] (3) pulled the victim's legs around his shoulders and, finally, (4) forced his penis inside her vagina. A reasonable trier of fact could have found the defendant had adequate opportunity for reflection between these sex acts and that the acts therefore occurred on separate occasions for purposes of application of [Penal Code] section 667.6, subdivision (d)." (*Id*. at pp. 1092-1093.)

In so concluding, we cited *People v. Plaza* (1995) 41 Cal.App.4th 377, in which the Court of Appeal affirmed the trial court's finding that five sexual assaults occurred on "separate occasions" even though all of the acts took place in the victim's apartment; the court explained that while the defendant's physical assault never ended, there were sufficient breaks in his "assaultive *sexual* behavior" to support the trial court's finding. (*Id*. at pp. 384-385; see also *People v. King* (2010) 183 Cal.App.4th 1281, 1325-1326 [the defendant, who sexually assaulted the victim on the side of the road, "momentarily paused to look around uneasily" when a car drove by, and then resumed his sexual assault by committing a "separate assaultive act"].)

However, where there are no such breaks in the assaultive sexual conduct, the mere changing of sexual positions will not suffice to support a separate occasion finding. In *People v. Pena* (1992) 7 Cal.App.4th 1294, the Court of Appeal reversed the trial court's finding that a forcible rape and oral copulation occurred on separate occasions,

explaining: "[N]othing in the record before this court indicates any appreciable interval 'between' the rape and oral copulation. After the rape, appellant simply flipped the victim over and orally copulated her. The assault here was also continuous. Appellant simply did not cease his sexually assaultive behavior, and, therefore, could not have 'resumed' sexually assaultive behavior." (*Id.* at p. 1316; see also *People v. Corona* (1988) 206 Cal.App.3d 13, 18 [reversing trial court's separate occasion finding where there was "no evidence of any interval 'between' . . . sex crimes affording a reasonable opportunity for reflection; there was no cessation of sexually assaultive behavior hence defendant did not 'resume[] sexually assaultive behavior[]'].)

Here, outside of S.'s car, defendant pulled down her underwear and penetrated her vagina and anus with one of his fingers. These actions supported two counts of forcible sexual penetration (Counts 2 and 3). There is no evidence in the record supporting a conclusion defendant stopped his sexually assaultive behavior between these penetrations. Defendant then penetrated S.'s vagina with his penis, commented that her vagina was "so small," and spit on his hand to lubricate his penis before reinserting it into her vagina. This supported one count of forcible rape (Count 4). The pause between insertion and reinsertion, with defendant's accompanying comment, provided the necessary cessation in assaultive behavior to support the trial court's finding of separate occasions with respect to this count. Finally, S. testified defendant also penetrated her anus with his penis, supporting one count of forcible sodomy (Count 5). Here again, there is no evidence in the record supporting a conclusion defendant stopped the assault between the rape and the sodomy. We must therefore conclude the trial court erred in imposing consecutive sentences for three of the four sexual offenses under Penal Code section 667.6, subdivision (d).

Nevertheless, we need not remand for resentencing because the trial court also indicated it would have exercised its discretion in imposing such sentences under Penal Code section 667.6, subdivision (c). As mentioned, this subdivision provides, "a full, separate, and consecutive term *may* be imposed for each violation of subdivision (e) if the crimes involve the same victim *on the same occasion*." (Pen. Code, § 667.6, subd. (c), italics added.) Here, the trial court specifically stated: "I would impose the sentence of a hundred years to life, whether it was mandatory or discretionary or anything else, it is the appropriate term, given the conduct in this case . . . ." The trial court added: "I would impose the same sentence under either one of those two sentencing schemes." Thus, while the trial court erred in concluding full-term consecutive sentences were required by Penal Code section 667.6, subdivision (d), it also properly exercised its discretion in imposing such terms under subdivision (c) of this section. The sentence imposed was not unauthorized.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
RENNER, J.